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In the Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

STATE OF GEORGIA, *et al.*

TONY GOODMAN,
Petitioner,

v.

STATE OF GEORGIA, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICI CURIAE FOR PARALYZED VETERANS OF AMERICA, EASTER SEALS AND TEN OTHER ORGANIZATIONS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

The States Have Historically Deprived Americans With Disabilities Of Their Constitutional Rights 4

A. Patterns of Unconstitutional State Treatment of Persons with Disabilities in the Administration of Justice 6

1. State Mistreatment of Persons with Disabilities in Penal Institutions. 7

2. State Interference with Other Aspects of the Administration of Justice 14

a. States Exclude People with Disabilities as Litigants 14

b. States Have Excluded People with Disabilities as Jurors. 16

B. Patterns of Unconstitutional State Interference with Constitutional Rights in Contexts other than the Administration of Justice. 17

1. State Treatment of Institutionalized Persons with Disabilities. 17

2. State Interference with the Right to Vote. 21

3. State Interference with the Rights to Marry and to Form Families. 22

4. State Discrimination in the Provision of Education. 25

CONCLUSION 28

THE AMICI ORGANIZATIONS ..... 1(a)

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CASES

In re A.W.,
637 P.2d 366 (Colo. 1981) 24

In re Adoption of Richardson,
59 Cal. Rptr. 323 25

Armstrong v. *Davis*,
275 F.3d 849 (9th Cir, 2001), *cert. denied*,
537 U.S. 812 (2002) 15

Beckford v. *Irvin*,
49 F. Supp. 2d 170 (W.D.N.Y. 1999) 13

Bednarski v. *Bednarski*,
366 N.W.2d 69 (Mich. Ct. App. 1985) 25

Bradley v. *Puckett*,
157 F.3d 1022 (5th Cir. 1998) 12, 13

Brown v. *Board of Education*,
347 U.S. 483 (1954) 25

Candelaria v. *Coughlin*,
787 F. Supp. 368 (S.D.N.Y. 1994) 13

Carey v. *Population Services International*,
431 U.S. 678 (1977) 24

Carter v. *Jury Commission*,
396 U.S. 320 (1970) 17

City of Cleburne v. *Cleburne Living Center, Inc.*,
473 U.S. 432 (1985) 21

Clark v. *Cohen*,
794 F.2d 79 (3d Cir. 1986) 20

Coleman v. *Wilson*,
912 F. Supp. 1282 (E.D. Cal. 1995) 12

Cook v. *State*,
495 P.2d 768 (Or. 1972) 24

DeLong v. *Brumbaugh*,
703 F. Supp. 399 (W.D. Pa. 1989) 16

Durham v. *Nu'Man*,
97 F.3d 862 (6th Cir. 1996) 11

Eisenstadt v. *Baird*,
405 U.S. 438 (1972) 23

Estelle v. *Gamble*,
429 U.S. 97 (1976) 7

Faretta v. *California*,
422 U.S. 806 (1975) 14

Galloway v. *Superior Court*,
816 F. Supp. 12 (D.D.C. 1993) 16

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437 F. Supp. 1209 (E.D. La. 1976) 18

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1990 U.S. Dist. LEXIS 1746
(E.D. La. Feb. 15, 1990) 18

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428 U.S. 153 (1976) 7

Harper v. *Virginia State Board Of Elections*,
383 U.S. 663 (1966).....21

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503 N.Y.S.2d 958 (Sup. Ct. 1986) 21

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599 F. Supp. 303 (N.D. Ala. 1984) 17

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484 U.S. 305 (1988).....26

Inmates of the Allegheny County Jail v. *Peirce*,
487 F. Supp. 638 (W.D. Pa. 1980) 9

Inmates of the Allegheny County Jail v. *Peirce*,
699 F. Supp. 1137 (W.D. Pa. 1988) 10

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848 F. Supp. 52 (W.D. Pa. 1994) 10

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565 F. Supp. 1278 (W.D. Pa. 1983) 9

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952 F. Supp. 520 (W.D. Mich. 1996) 12

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Key v. *Grayson*, 179 F.3d 966 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000).....6

LaFaut v. *Smith*,
834 F.2d 389 (4th Cir. 1987) 6,8

Lewinson v. *Crews*,
282 N.Y.S.2d 83 (App. Div. 1967) 16

Manhattan State Citizen's Group Inc. v. *Bass*,
524 F. Supp. 1270 (S.D.N.Y. 1981) 21

In re Marriage of Carney,
598 P.2d 36 (Cal. 1979) 25

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575 S.W.2d 766 (Mo. Ct. App. 1978) 25

Mills v. *Board of Education*,
348 F. Supp. 866 (D.D.C. 1972) 26

Miranda v. *Munoz*,
770 F.2d 255 (1st Cir. 1985) 8

New York v. *County of Delaware*,
82 F. Supp. 2d 12 (N.D.N.Y. 2000) 22

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82 F. Supp. 2d 19 (N.D.N.Y. 2000) 22

Olmstead v. *L.C. ex rel. Zimring*,
527 U.S. 581 (1999) 17

Owens-El v. *Robinson*,
442 F. Supp. 1368 (W.D. Pa. 1978) 9

Panitch v. *Wisconsin*,
444 F. Supp. 320 (E.D. Wis. 1977) 26

Parrish v. *Johnson*,
800 F.2d 600 (6th Cir. 1986) 7

Pennsylvania Ass'n for Retarded v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).....26

People v. *Guzman*, 555 N.E.2d 259 (N.Y. 1990).....16

People v. *Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984).....14

Plyler v. *Doe*, 457 U.S. 202 (1982).....25

Poe v. *Lynchburg Training Sch. & Hospital*, 518 F. Supp. 789 (W.D. Va. 1981).....24

Ramos v. *Lamm*, 485 F. Supp. 122 (D. Colo. 1979).....11

Reynolds v. *Sims*, 377 U.S. 533 (1964).....21

Robinson v. *Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd*, 295 F.3d 1183 (10th Cir. 2002).....27

Ruiz v. *Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982).....12,13

Schmidt v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999).....6,12

Sites v. *McKenzie*, 423 F. Supp. 1190 (N.D.W.Va. 1976).....10

Skinner v. *Oklahoma*, 316 U.S. 535 (1942).....23

Society for Good Will to Retarded Children v. *Cuomo*, 745 F. Supp. 879 (E.D.N.Y. 1990) 19

State v. *Spivey*, 700 S.W.2d 812 (Mo. 1985).....16

In re Sterilization of Moore, 221 S.E.2d 307 (N.C. 1976) 24

Tennessee v. *Lane*, 541 U.S. 509 (2004)..... *passim*

T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993) 23

Troxel v. *Granville*, 530 U.S. 57 (2000).....25

Waldrop v. *Evans*, 871 F.2d 1030 (11th Cir. 1989) 10

Weems v. *United States*, 217 U.S. 349 (1910).....7

Wellman v. *Faulkner*, 715 F.2d 269 (7th Cir. 1983) 8

Westlake v. *Lucas*, 537 F.2d 857 (6th Cir. 1976) 8

Wyatt ex rel. Rawlins v. *Rogers*, 985 F. Supp. 1356 (M.D. Ala. 1997).....18

Wyatt v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974).....19

Yarbagh v. *Roach*,
736 F. Supp. 318 (D.D.C. 1990).....13

Youngberg v. *Romeo*,
457 U.S. 307 (1982).....18

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434 U.S. 374 (1978).....23

STATUTES

20 U.S.C. §1400(c)(2).....26

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amended,1994 Ark. Acts No. 4, § 6 (1994).....16

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are organizations of people with disabilities, public interest groups, and professional organizations that advocate for the rights of people with disabilities.[2] *Amici* and their members have a vital interest in effective enforcement of Title II of the Americans with Disabilities Act ("ADA") and, to that end, in the Court's correct recognition of Congress' abrogation of Eleventh Amendment immunity for ADA violations. That result is required in order to ensure that persons with disabilities can vindicate and enforce their rights and can obtain the full range of remedies Congress enacted.

SUMMARY OF ARGUMENT

In *Tennessee* v. *Lane*, 541 U.S. 509, 524 (2004), this Court described the "backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" before Congress when it enacted Title II of the ADA. The Court recounted State governments' long history of mistreating Americans with a broad range of physical and mental disabilities. *Id.* at 524-27. Among other things, the Court recognized State

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* are the Paralyzed Veterans of America, Easter Seals, the American Association of Retired Persons, the American Association of People with Disabilities, the Epilepsy Foundation, the National Federation of the Blind, the Polio Society, the Association on Higher Education and Disability, United Cerebral Palsy Associations, Inc., the National Lawyers Guild, the National Council on Independent Living, and the National Mental Health Consumers' Self-Help Clearinghouse.

patterns "of unequal treatment in . . . the penal system," as well as more generally "in the administration of justice." *Id.* at 525.

In addition to this unequal treatment within the justice system, the Court described evidence before Congress that States violated the constitutional rights of people with disabilities by preventing them from voting, marrying, and serving as jurors; by committing them to State institutions without justification and abusing and neglecting them while in those institutions; by irrationally discriminating against them in decisions about where they could live; and by engaging in a pattern of discrimination in a wide range of other public services and programs, including public education. *Id.*

Noting the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id.* at 528-29, the Court unequivocally concluded that the "extensive record of disability discrimination" existing when Congress enacted the ADA "makes clear beyond peradventure that inadequate provision of public services . . . was an appropriate subject for prophylactic legislation" through Title II of the ADA. Indeed, as the Court recognized, Congress described the pervasive pattern of State-sponsored discrimination in the body of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* at 529.

Lane, therefore, resolved the first part of the "congruence and proportionality" test by which this Court analyzes the constitutionality of Congress' abrogation of Eleventh Amendment immunity, *viz.*, whether Congress enacted Title II in response to a history and pattern of unequal State treatment. Yet, the record of State

unconstitutional treatment of Americans with disabilities – including mistreatment of prisoners – is significantly more extensive than *Lane* recited. *Amici* will focus on that extensive historical record of discrimination. Because *amici* anticipate that the parties will detail the pervasive evidence of State-sponsored unconstitutional treatment of imprisoned people with disabilities contained in Congress' legislative record, this brief will avoid replowing that ground and will therefore focus on the compelling and well-documented history of State unconstitutional conduct – in prisons and other contexts – reported in the judicial decisions and the public record that predate the ADA. Such conduct victimized persons with disabilities not only in the context of prisons, but in many aspects of the administration of justice, and also in additional contexts where fundamental rights were violated. These areas include discrimination against persons with disabilities in such basic aspects of civic, societal and personal endeavors as jury service, institutionalization, education, voting rights, and the rights to marry and raise families.

At the end of the day, the historical record amply confirms what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under §5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA, and Title II represents a congruent and proportional response to the longstanding pattern of State constitutional violations.

ARGUMENT

The States Have Historically Deprived Americans With Disabilities Of Their Constitutional Rights

Tennessee v. *Lane*, 541 U.S. 509 (2004), reiterated the established test for determining whether an act of Congress validly abrogates State immunity. After first identifying the constitutional rights at issue, the inquiry then focuses on whether there is a sufficient support for Congress' determination to regulate, and, finally whether the act "is an appropriate response to this history and pattern of unequal treatment." *Id.* at 530. In holding that Congress properly abrogated state immunity from damages in ADA claims related to appropriate access to the court system as part of the administration of justice, *Lane* concluded that Title II of the ADA responded to a long history and pattern of pervasive, irrational, intentional, and unconstitutional discrimination by the States – including, specifically, unequal treatment of prisoners with disabilities.

Lane clarified that the abrogation issue must be analyzed based on the specific constitutional rights at issue in each particular case. Accordingly, *Lane* fully analyzed "the class of cases implicating the fundamental right of access to the courts," part of the system for the administration of justice. *Id.* at 533-34. This case, too, deals with the system of the administration of justice – after trial and in the penal system. *Lane*'s rationale applies equally to the pervasive unequal treatment of prisoners with disabilities as it does to the unconstitutional treatment of litigants with disabilities.

Viewed in proper perspective, respondents' position in this case seeks to create an exception to the holding in *Lane*. That result is wholly unwarranted, especially where *Lane* itself made several determinations applicable to this case. First, in considering the history of unconstitutional conduct upon which Congress based

Title II, *Lane* looked at the entire range of unconstitutional conduct that Congress considered, not merely the conduct in the particular area at issue in the particular case. *Id.* at 524 ("Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights").

Second, *Lane* made plain that courts considering the historical backdrop to a Congressional enactment are not limited to reviewing only the legislative record, but also must look to the existing judicial and public record. *Id.* at 529 (reviewing judicial decisions, then–extant statutes, and "statistical, legislative and anecdotal evidence" of the widespread exclusion of persons with disabilities from public services).

Third, the Court described in detail the ample record of unconstitutional conduct that the ADA was designed to remedy: "The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." *Id.* at 516. The Court cited specific evidence of unconstitutional conduct in the areas of prisons, voting rights, marriage, jury service, institutionalization, access to the judicial system, and public education. *Id.* at 524-25.

Finally, and most important, *Lane* concluded that the "extensive record" before Congress demonstrated that it enacted Title II in response to a history and pattern of state-sponsored discrimination. *Id.* at 528 ("Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling").

In the legal context set by *Lane*, and to help inform this Court's consideration of the historical record of States' prior mistreatment of people with disabilities, *amici* will address multiple examples of the States' unconstitutional conduct that justified Congress in authorizing suits against States for damages under §5 of the Fourteenth Amendment.

A. Patterns of Unconstitutional State Treatment of Persons with Disabilities in the Administration of Justice.

Lane noted the "pattern of unequal treatment" within the system of the administration of justice, including the treatment of persons with disabilities as jurors; as litigants and criminal defendants; and as prisoners. *Id.* at 525 & nn. 9,11,14. *Lane* has already held that Title II "constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment" within the context of the system of justice "implicating the fundamental right of access to the courts." *Id.* at 534. No reason exists to exclude other components of the administration of justice, especially where *Lane* expressly referenced the very conduct involved in this case: discrimination against prisoners with disabilities. *Id.* at 525 n.11 (citing and reciting the specific "unequal treatment" in *La Faut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987)(inaccessible toilet facilities for inmate with paraplegia); *Schmidt* v. *Odell*, 64 F. Supp.2d 1014 (D. Kan. 1999)(prisoner with amputated limbs compelled to crawl on jail floor); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999)(prisoner with disability denied access to program antecedent to parole), *cert. denied*, 528 U.S. 1120 (2000).

1. State Mistreatment of Persons with Disabilities in Penal Institutions.

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and specifically noted pervasive discrimination against people with disabilities. *See* 42 U.S.C. §12101(a)(3),(5). The record before Congress when it passed Title II was replete with examples of State-sponsored discrimination in penal institutions (as well as in civil institutions).

Such discrimination still exists (as it did when Title II was enacted), contrary to the Eighth Amendment's prohibition of disproportionate punishments, *Weems* v. *United States*, 217 U.S. 349, 366-67 (1910), and of "unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). The Constitution also forbids State prisons from acting with deliberate indifference to the medical needs of prisoners with disabilities, *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976), because this practice subjects prisoners with disabilities to multiple punishments: in addition to their sentences, they suffer unnecessary pain, loss of dignity, and, in some cases, a shortened lifespan.

Despite these constitutional protections, State prisons nonetheless abused prisoners with disabilities, denying them fundamental rights. For example, a Michigan prison routinely forced two inmates with paraplegia to sit in their own feces for hours, causing medical complications. *Parrish* v. *Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on multiple occasions assaulted the inmates with a knife and frequently called one inmate a "'crippled bastard'" who should be dead. *Id.* at 603. Clearly, the State's conduct

furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

Similarly, in *LaFaut* v. *Smith*, 834 F.2d 389, 392 (4th Cir. 1987), a prisoner in a wheelchair was denied adequate toilet facilities. "[I]n order to use the toilet, he had to lie on the floor, drag his body across it, and then pull himself up onto the commode." He would often "slip down into the toilet bowl water." *Id.* On one occasion, the plaintiff "fell off the toilet and broke his right leg." *Id.* at 393. As a result of these conditions, the prisoner relied on a catheter and contracted a kidney infection. *Id.* at 392-93. Although aware of plaintiff's situation, which could have been avoided by "the simple mounting of a handicap bar," the prison took no action for months. *Id.* at 393. The court concluded that this "neglect constituted 'deliberate indifference' and therefore violated the Eighth Amendment." *Id.* at 394. *See also Miranda* v. *Munoz*, 770 F.2d 255, 257 (1st Cir. 1985) (pre-trial detainee with epilepsy "received no medical attention" and died); *Wellman* v. *Faulkner*, 715 F.2d 269, 272, 274 (7th Cir. 1983) (prison's medical system did not meet constitutional standards for prisoners who had colostomies, who were "forced to wash out and re-use [single-use waste-collection] bags," a "practice [that] literally stank" and for prisoners with mental disorders who had no treatment because the "position of staff psychiatrist has been unfilled for over two years"); *Westlake* v. *Lucas*, 537 F.2d 857, 859 (6th Cir. 1976) (denying defendants' motion to dismiss §1983 claim brought by prisoner suffering from ulcer, who was denied medical treatment, resulting in the vomiting of blood); "Hearing Set on the Treatment of Disabled Prisoners," *The New York Times* at 43 (Jan. 17, 1974) (describing tour by chair of State Senate Select Committee for the Mentally and Physically Handicapped of four New York City prison wards in preparation for upcoming hearings).

One Pittsburgh jail required almost two decades, and repeated judicial directives, to remedy its "constitutionally impermissible" treatment of prisoners with physical and mental disabilities. *Owens-El* v. *Robinson*, 442 F. Supp. 1368, 1380 (W.D. Pa. 1978). "Inmates with epilepsy" experiencing seizure and "those with possible severe mental disorders were routinely and "inappropriately" placed in restraints:

> In this bleak room the inmates are placed in a hospital gown or naked on a canvas cot with a hole cut in the middle. Their body wastes drop through the hole into a tub on the floor underneath the cot. The tub is emptied twice a day. These inmates are shackled by leather restraints to the canvas cots. . . . The medical logs, introduced into evidence, revealed that inmates have been held in such restraints for as long as twenty-nine days.

Id. at 1380. The court held that the "present mode of using the restraint room is constitutionally impermissible." *Id.* at 1381. Two years later, the district court, after a remand for further consideration of mental health care for inmates, made the additional finding that there was "no system for care of mentally ill inmates in the jail and that the haphazard and inconsistent care and protection now being afforded is far below minimum standards," which "aggravate[d] – rather than alleviate[d] – the conditions of many of the most seriously ill. *Inmates of the Allegheny County Jail* v. *Peirce*, 487 F. Supp. 638, 643 (W.D. Pa. 1980). But the district court's orders were not sufficient to remedy the problems. Years later, the inmates were forced to seek a contempt citation for defendants' failure to comply with the prior orders, and to seek additional relief, contending that "unconstitutional conditions which existed . . . in 1978 still were extant in 1983." *Inmates of the Allegheny County Jail* v. *Wecht*, 565

F. Supp. 1278, 1280 (W.D. Pa. 1983). One of these conditions was defendants' failure to maintain a log documenting the use of restraints. *Id.* at 1285. Another was defendants' failure to comply with the mental health standards set forth in the 1980 order. *Id.* at 1287-88. Five years later, the inmates again sought sanctions, in part because "the quality of the physical and mental health care provided to inmates [was] deteriorating." *Inmates of the Allegheny County Jail* v. *Peirce*, 699 F. Supp. 1137, 1141 (W.D. Pa. 1988). The unconstitutional conditions were not ultimately resolved until the construction of a new jail in 1994, eighteen years after the plaintiffs first filed suit. *Inmates of the Allegheny County Jail* v. *Peirce*, 848 F. Supp. 52 (W.D. Pa. 1994).[3]

West Virginia "denie[d] prisoners [transferred to] mental institutions the equal protection of the law" by refusing to consider them for parole until they had recovered from their mental illness, instead of when they were "no longer likely to cause serious harm" to themselves or others. *Sites* v. *McKenzie*, 423 F. Supp. 1190, 1194-95 (N.D.W.Va. 1976). And these are but a few of the frequently recurring instances of mistreatment of prisoners with mental disabilities or illnesses.[4]

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[3] In its 1994 order, the trial judge responded to criticism that he had coddled inmates: "I need only remember the stench which assailed the nostrils when I entered the jail for the first time in 1976, or recall the sight of human beings strapped down on canvas cots, their wrists and ankles held tight by leather thongs, to take comfort in believing that regardless of what the critics said, what I ordered was the right thing to do." *Id.* at 53.

[4] *See, e.g.*, *Waldrop* v. *Evans*, 871 F.2d 1030, 1032 (11th Cir. 1989) (denying defendant prison doctors' motions for summary judgment on issue of qualified immunity on Eighth Amendment claim after prisoner with mental illness "slashed his own forearm," "gouged out his left eye," used a prison-issued razor blade to cut his scrotum, losing both testicles," and "damaged [his right eye] so badly that he lost sight"); "Study Cites Lack of

Even after enactment of the ADA, unconstitutional treatment of prisoners with disabilities by the States persists. In *Durham* v. *Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996), a mentally ill inmate in shackles was beaten for ten minutes and had his arm broken by two guards because he refused to clean up his urine from the floor after a nurse refused access to a bathroom. And in several cases brought after enactment of the ADA, prisoners with amputated limbs or who used wheelchairs sought redress for their inability to access showers, use the toilet, or even

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Programs for Retarded Inmates in U.S.," *The New York Times*, p. A17 (June 14, 1982) (describing survey by the National Criminal Justice Reference Service of deficiencies in prisons nationwide to accommodate prisoners with mental retardation).

The court in *Ramos* v. *Lamm*, 485 F. Supp. 122, 142 (D. Colo. 1979), *aff'd in relevant part*, 639 F.2d 559 (10th Cir. 1980), examined the appalling conditions in a Colorado maximum security prison, including the "emergency situation" in existence for prisoners with mental health needs, which situation amounted to a "time bomb ready to explode." Not only did the prison lack "adequate staff trained in psychology or psychiatry," but in fact the "psychology department was abolished." *Id.* at 144. "Acutely psychotic patients, suicidal patients, patients on psychotropic medication and mentally retarded prisoners [were] housed in the most restrictive cellhouse . . . along with prisoners in administrative and punitive segregation who are being punished for disciplinary violations." *Id.* at 145. In this cellhouse, "prisoners are locked in their cells for more than 22 hours a day," *id.* at 138; in "small cells that [were] filthy, inadequately lighted, improperly ventilated and infested with vermin and rodents." *Id.* at 145. Rather than remedying these prisoners' conditions, "[s]uch restrictive confinement cause[d] irreparable disabilities." *Id.* Conditions were so horrible that the defendants did not even "attempt[] to defend by asserting that plaintiffs' constitutional rights have not been violated," but instead argued "that Colorado has made substantial and good faith efforts to resolve" the unsafe conditions. *Id.* at 167.

move about within the prison or jail; several were forced to ambulate on the stumps of their knees or even to crawl.[5]

By any measure, the suffering endured by inmates with disabilities is reaching crisis proportions. A recent class action in California is but one illustration of State-wide systemic and unconstitutional abuse of prisoners with mental disabilities.[6] As explained in *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1305-23 (E.D. Cal. 1995), California failed to: screen inmates for basic needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners

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[5] *See Bradley* v. *Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (Mississippi prisoner with leg brace stated claim by alleging he was denied shower chair, leaving him "unable to bathe for several months . . . [and] he was therefore forced to clean himself using toilet water . . . result[ing] in a fungal infection"); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1018, 1021 (D. Kan. 1999) (prisoner with double amputation denied wheelchair was forced to "ambulate[] through the jail on his knees" and to "crawl [through] the jail parking lot"); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (prisoner with bilateral amputation unable to use shower, toilet, drinking fountain, or sink).

[6] California is not alone in unconstitutionally discriminating against persons with disabilities in state-run institutions. *See* Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002), at http://consensusproject.org; Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* ch. III (Oct. 2003), at http://www.hrw.org/reports/2003/usa1003/. Once incarcerated, inmates with disabilities are more likely to be victimized, exploited, and injured than are other inmates. *See, e.g., Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982).

with mental disabilities, including use of isolation and taser guns. *Ibid.*[7] To ensure an effective remedy for well-documented state discrimination against prisoners with disabilities, Congress abrogated Eleventh Amendment immunity in ADA Title II.

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[7] *See also Bradley* v. *Puckett*, 157 F.3d at 1025-26 (failure for several months to provide means to bathe led to infection); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (plaintiff "was regularly deprived use of his wheelchair for extended periods of time [and] . . . was unable to shower"); *Candelaria* v. *Coughlin*, 787 F. Supp. 368, 374 (S.D.N.Y. 1994) (prisoner with paraplegia was transferred to a prison without adequate facilities for no reason and while there was denied catheter and had to rely on other inmates to help him use the standard toilet; while on a trip to the State hospital, he fell out of his wheelchair and was left on the floor of a holding pen for several hours); *Yarbagh* v. *Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for more than a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in more than a year and had fallen repeatedly when attempting to move from his wheelchair to his bed); *Ruiz*, 503 F. Supp. at 1274-1391 (126-page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs; systematic refusal to provide individualized treatment to inmates, regardless of their type of disability; failure to maintain medical records; failure to screen inmates for psychiatric care; segregation of inmates with acute psychological disorders; and disciplining prisoners with mental retardation for infractions of rules they did not understand).

2. State Interference with Other Aspects of the Administration of Justice.

a. States Exclude People with Disabilities as Litigants.

States historically denied persons with disabilities an equal opportunity to litigate. Such discrimination has taken various forms: from the lack of interpreters or other necessities for effective communication, to the imposition of architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Due process principles are violated when people with disabilities are unable effectively to access the judicial system, either in the civil or the criminal context. *See, e.g., Lane*, 541 U.S. at 523 (Due Process Clause protects "the right of access to the courts" for both civil litigants and for criminal defendants).

For criminal defendants, due process guarantees that the "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 820 n.15 (1975). As *Lane* illustrated, however, state criminal justice systems have perpetuated barriers that exclude persons with disabilities from participating in judicial and related administrative proceedings, even when their own liberty is at stake. In *People* v. *Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984), a pre-ADA case that constitutes part of the history of discrimination supporting Congress' determination to regulate, the court held that a criminal defendant with hearing impairment who had been twice convicted without the assistance of a qualified sign-language interpreter had been deprived of his constitutional rights. As an accommodation in one of his criminal trials, the court provided a Spanish interpreter, despite the fact that the defendant could not "read, write or lip-read in either English or Spanish," and in fact was

"so severely hearing impaired that he is and has been . . . incapable of adequately expressing himself without the aid of qualified [sign-language] interpreters." *Id.* at 430. Although the Spanish interpreter attempted in good faith to translate, "the conclusion [was] inescapable that [the defendant] did not adequately comprehend or participate in the . . . trial at which he was convicted." *Id.* at 431. Additionally, the defendant believed that he was "obligated to take the stand . . . on pain of going to jail." *Id.* at 434. At the second trial, "it was conceded that no interpreter was present." *Id.* at 431. The court concluded that the defendant had been denied the effective assistance of counsel in violation of the Sixth Amendment, forced to testify in violation of the Fifth Amendment, and that his conviction was unconstitutionally obtained in violation of the Fourteenth Amendment. *Id.* at 434.

Similar abuses persisted even after Congress enacted the ADA. In *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002), for example, California failed to provide prisoners with disabilities adequate access to, and a meaningful opportunity to participate in, parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inadequate accommodations to help them understand the contents of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857 (footnote omitted). The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental disabilities or mental illnesses. *Id.* at 858 n.10. Affirming on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with

the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. Furthermore, there was no reasonable relation to any legitimate penal interest that could justify the impingement on the prisoners' and parolees' constitutional rights. *Id.* at 873-74.

b. States Have Excluded People with Disabilities as Jurors.

When Congress passed the ADA, it was relatively common for State courts categorically to exclude persons with certain disabilities from serving on juries. *See Lane*, 541 U.S. at 525 & n.9 (citing statutes disqualifying persons who are "infirm," "decrepit," or "mentally and physically disabled"). New York, for example, barred persons with disabilities from serving on juries for more than 150 years. *See Lewinson* v. *Crews*, 282 N.Y.S.2d 83, 87-88 (App. Div. 1967) (Hopkins, J., dissenting) (noting that law excluding blind jurors had been in place since 1829); *People* v. *Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990) (noting that New York state courts ceased excluding people with disabilities only after passage of ADA). New York was far from an anomaly.[8]

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[8] States with discriminatory jury service laws in place at the time of the passage of the ADA include Arkansas, Ark. Code Ann. §16-31-102 (1987), *amended* 1994 Ark. Acts No. 4, §6 (1994) (barring those with "substantial impairments" to hearing or sight from jury service); the District of Colombia, *Galloway v. Superior Court*, 816 F. Supp. 12, 16-17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" in passing the ADA); Missouri, *State* v. *Spivey*, 700 S.W.2d 812, 813-14 (Mo. 1985) (permitting the exclusion of "deaf, mute, deaf-mute, and blind persons, from inclusion in the jury pool" on the grounds that they did not have "a community of attitudes or ideas"); and Pennsylvania, *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989) (Superior

Of course, these laws were on the books almost two decades after this Court held that "the State may no more extend it [jury service] to some of its citizens and deny it to others . . . than it may invidiously discriminate in the offering . . . of the elective franchise." *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to function as jurors. Nevertheless, in 1984, county officials in Alabama "conceded that Shelby County is not equipped to accommodate jurors who have severe physical disabilities, and that the Shelby County courts routinely excuse such persons from jury service, as do all of the State's courts." *Hill* v. *Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984).

B. Patterns of Unconstitutional State Interference with Constitutional Rights in Contexts other than the Administration of Justice.

The historical record that informed enactment of the ADA was not limited to the system of justice. Accordingly, unconstitutional State mistreatment of persons with disabilities in other contexts provides additional illumination of Congressional intent to abrogate state immunity.

1. State Treatment of Institutionalized Persons with Disabilities.

Singling out persons with disabilities for unnecessary institutionalization is a form of

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Court judge testified "he would disqualify a deaf person under all circumstances").

discrimination. *Olmstead* v. *L.C. ex rel. Zimring* 527 U.S. 581, 600 (1999), and *id.* at 613-14 (Kennedy, J., concurring); *see also Lane*, 541 U.S. at 524-25 (the court has "identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment . . . [and] the abuse and neglect of persons committed to state mental health hospitals"). State discrimination of this sort violates the due process rights of persons in civil institutions articulated in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-19 (1982): safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. *Lane* noted particular examples of patients in state mental health hospitals being physically abused and drugged. 541 U.S. at 524 n.10. Despite *Youngberg* and the ADA, States have resisted ameliorating the unconstitutional conditions in their civil institutions.

A case brought by a class of children with mental retardation, emotional disturbance, and physical disabilities against the State of Louisiana exemplifies a State's persistent unconstitutional behavior. In 1976, the plaintiffs established physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered remedial action. *Gary W.* v. *Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, twenty-five years later, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions were still unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W.* v. *Louisiana*, No. 74-2412, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).

Many other state-run institutions also continue to deprive persons with disabilities of liberty and dignity, while exposing residents to dangerous conditions. For example, a federal judge described Alabama's institutions

as "essentially warehousing patients in an inhumane environment." *Wyatt ex rel. Rawlins* v. *Rogers*, 985 F. Supp. 1356, 1361-62 (M.D. Ala. 1997). These conditions existed even after Alabama entered into a consent decree to improve the state's record on institutionalization. The institutions were the subjects of similar findings as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straightjacket for nine years, among others. *Wyatt* v. *Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974). By 1991, a court-appointed expert concluded that "there remain[ ] significant problems and noncompliance . . . most significantly, unnecessary institutionalization." 985 F. Supp. at 1367.

The same year in which Congress passed Title II of the ADA, children at a New York facility for people with mental retardation were regularly left unclothed and unattended in their own bodily wastes on cold floors while the staff watched television. *Society for Good Will to Retarded Children* v. *Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990). The federal court described New York's Long Island Development Center in grim terms (*id.* at 879):

> "[V]isits by the court to the Center revealed a deplorable situation. Clients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television. The facility's inadequate professional personnel failed to provide suitable training or educational programs for residents. Entry into the institution often led to swift physical and emotional deterioration and loss of skills. The huge population of some fifteen

> hundred clients made effective management and control impossible."

Similarly, Kentucky's Outwood Institution has been described as "atrocious." *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233, 1237 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *supplemental op.*, 718 F.2d 182 (6th Cir. 1983).

In addition to mistreating people with disabilities while they are in institutions, the States have a long history of institutionalizing people unnecessarily. *See, e.g. Clark* v. *Cohen*, 794 F.2d 79, 85-87 (3d Cir. 1986) (documenting ten-year effort to secure the release of a woman with mild retardation who had been institutionalized for 40 years; even after repeal of commitment statute and after doctors recommended her release, State officials did not review her case). In the decade before Congress enacted Title II, several States still allowed commitment of people with "grave[] disab[ilities]" without considering the alternative of care by the individual's family or other State programs.[9] Congress was fully aware of such unnecessary and unconstitutional civil commitment practices when it passed the ADA. *See* United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29, 34 (1983).

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[9] *See, e.g.*, Colo. Rev. Stat. Ann. §§17-176, 177 (West. Supp. 1985); Conn. Gen. Stat. Ann. §171-178(c) (West. Supp. 1985); Fla. Stat. Ann. §394.467(1)(B)(I) (Supp. 1985); Ill. Comp. Stat. Ann. Ch. 911/2 1-119(2) Smith-Hurd Supp. 1985); N.J. Stat. Ann. §§30:4-44, 30:4-45 (West 1977); N.Y. Mental Hyg. Law §9.32 (McKinney 1978 & Supp. 1985); Vt. Stat. Ann. tit. 18, §7101(17)(B)(ii) (Supp. 1985).

2. State Interference with the Right to Vote.

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." *See* 42 U.S.C. §12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Despite the rule that classifications infringing the ability to exercise the right to vote must be examined with strict scrutiny, *Harper* v. *Virginia State Bd. Of Elections*, 383 U.S. 663, 666 (1966), States historically prevented Americans with disabilities from exercising that right through a host of laws. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in part and dissenting in part) (citing 1979 article finding that "most States still categorically disqualified 'idiots' from voting"). These laws, facially or as applied, categorically excluded people with disabilities from voting, without reference to individual competence. *See Manhattan State Citizen's Group Inc.* v. *Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied). As the Court recently observed "[t]he majority of these laws remain on the books." *Lane*, 541 U.S. at 524 nn.6,13 (noting both the "categorical [disqualifi[cation]" of those deemed "idiots" from voting, and the inability to access polling places by voters with impaired mobility).

Additionally, States denied individuals with disabilities physical access to both polling places and voting machines. In *Hill* v. *New York State Bd. of Elections*, 503 N.Y.S.2d 958 (Sup. Ct. 1986), for example, the court noted that the New York State elections board permitted local entities to position polling places in sites inaccessible to people with disabilities.

Discrimination is pervasive and ongoing. Even studies within the past decade have concluded that, in some states, a significant portion of voting sites were inaccessible to voters with physical disabilities. Confronted with evidence that in two New York counties, all polling places but one were inaccessible to persons with disabilities, a federal court ordered access pursuant to the ADA. *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); *New York* v. *County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000).[10]

Because the States' categorical disenfranchisement of persons with disabilities and interference with such persons' rights to vote are themselves unconstitutional, the reasonable accommodation requirements of Title II represent a congruent and proportional legislative response in such circumstances.

3. State Interference with the Rights to Marry and to Form Families.

States also have interfered with the rights of persons with disabilities to marry, one of the "basic civil rights," without the requisite showing of a compelling interest. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *see also Zablocki* v. *Redhail*, 434 U.S. 374, 381 (1978).

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[10] *See also* Voting Rights Primary Access Committee, *Exercising My Right to Vote: The Accessibility of New Hampshire Polling Places to Citizens with Disabilities* (Apr. 1996) (in 1996, 59% of New Hampshire's polling places physically inaccessible); Coalition for Accessible Political Elections, *Report of the National Voter Independence Project* (Feb. 1999) (nationwide survey showed that 47% of polling places lacked accessible path to voting area, and 52% of polling places lacked a booth large enough to accommodate a wheelchair); Debra Auspitz, *Disabled Votes*, PHILADELPHIA CITY PAPER, Mar. 9-16, 2000 (survey found that only 27% of Philadelphia polling places were accessible).

Numerous States categorically restricted the rights of persons with disabilities to marry, without any determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes when the ADA was enacted.[11] Some of these statutes remain on the books. *See* Tenn. Code Ann. §36-3-109 (2001) (forbidding issuance of a marriage license "when it appears" that an applicant may be "insane or an imbecile"); D.C. Code Ann. §46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void); *cf.* Utah Code Ann. §30-1-2(1) (1987) (marriage of person infected with AIDS is "prohibited" and "void") (declared void and invalid in *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). *Lane* observed that States continue to engage in "systematic deprivations of fundamental rights," including maintaining statutes that criminalize or declare void and illegal the marriages of persons with mental disabilities. 541 U.S. at 524.

The States also share a long pattern of depriving Americans with disabilities of the right and ability to procreate.[12] When Congress enacted the ADA, some

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[11] *See Lane*, 541 U.S. at 524 & n.8; Bruce Dennis Sales, *et al.*, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 16-20 (Plenum Press 1982) (as of 1980, forty-two States and the District of Columbia had statutes restricting marriage for persons with disabilities). *See also* Cal. Civ. Code §4201 (1987); D.C.Code Ann. §30-103 (1981); Iowa Code Ann. §595.3 (1990); Mich. Com. Laws §551.6 (1988); Miss. Code Ann. §41-21-45 (1990); Pa. Stat. Ann. tit. 48, §1-5 (West 1990); R.I. Gen. Laws §15-1-5 (1988); Vt. Stat. Ann. tit. 15, §514 (1989); W. Va. Code §48-2-2 (1990).

[12] The right to procreate is a fundamental right that is "free from unwarranted governmental intrusion." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). Limitations of this fundamental right are subject to heightened scrutiny. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977).

states still had laws authorizing involuntary sterilization of persons with disabilities. *See Cook* v. *State*, 495 P.2d 768 (Or. 1972) (upholding state statute mandating sterilization). In 1981, former patients of Virginia institutions who were involuntarily sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to notify them that they had been sterilized – causing them to suffer "medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe* v. *Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981). Many state courts continued to uphold these statutes. *See, e.g., In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook* v. *State*, 495 P.2d 768 (Or. 1972). And even after compulsory sterilization laws were repealed, some States enacted statutes that allowed sterilization on the consent of a superintendent of a custodial care institution or a guardian.[13] Contemporaneous commentators, in contrast, had concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [was] the only remedy available to further a compelling governmental interest." *In re A.W.*, 637 P.2d 366, 368-69 (Colo. 1981) (*citing* Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck* v. *Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 955 (1977)).

With respect to people with disabilities who bear children, States have interfered with the constitutional right to raise those children. This Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000).

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[13] Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 Law & Psych. Rev. 57 (1978).

Yet, in matters involving the parent-child relationship, States have historically treated parents with mental or physical disabilities quite differently from other parents. This discrimination often relies on unjustified stereotypes, rather than actual individual differences in capacity. In *Bednarski* v. *Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, a holding the appellate court reversed. In another case a California appellate court condemned the trial court's conclusion that a father was "deemed forever unable to be a good parent simply because he is physically handicapped" and observed that, "[l]ike most stereotypes, this is both false and demeaning." *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979). *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing custody order that had been based on unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap"); *In re Adoption of Richardson*, 59 Cal. Rptr. 323, 329-30 (Ct. App. 1967) (reversing trial court's refusal to allow a deaf couple to adopt a child "solely because they were deaf-mutes").

4. State Discrimination in the Provision of Education.

"[E]ducation is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). The categorical exclusion of any class of children from the educational system poses serious equal protection concerns. *See Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) ("denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause"). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities. *See Lane*, 541 U.S. at 524 & n.

12 (citing examples of the segregation and exclusion of children with physical and mental disabilities from schools). Prior to the ADA, a number of States categorically excluded children with disabilities from public education. *See, e.g.*, Del. Const. art. 10, §1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were "excluded entirely" from the public school system, and "more than one-half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. §1400(c)(2).

Contemporaneous judicial decisions confirm Congress' conclusion. In *Pennsylvania Ass'n for Retarded* v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), The court found that plaintiffs who challenged Pennsylvania statutes excluding them from school had articulated equal protection and due process claims under the rational basis test. *See also Honig* v. *Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977) (even after passage of EAHCA, Wisconsin excluded students with disabilities from educational opportunities). In passing the ADA, Congress relied upon a Civil Rights Commission Report finding that "a great many handicapped children continue[d] to be excluded from the public schools" after the EAHCA.[14] Congress

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[14] United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983).

therefore found that States were still discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. §12101(a)(3). Instances of unconstitutional State exclusion still persist. *See, e.g., Robinson* v. *Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd*, 295 F.3d 1183 (10th Cir. 2002) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding).

In short, Congress' specific findings, the well-established judicial history, and the legislative history all provide extensive and compelling evidence that States participated in and perpetrated a pattern of unconstitutional discrimination, including their treatment of prisoners with disabilities. This historical record amply supports Congress' abrogation of the Eleventh Amendment for Title II of the ADA.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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THE AMICI ORGANIZATIONS

Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans' service organization founded in 1946 with more than 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its members and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of its members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990.

Easter Seals has been providing services that help individuals with disabilities and special needs, and their families, live better lives for more than 80 years. Easter Seals promotes the passage and enforcement of federal legislation, including the ADA, that enables people with disabilities to achieve greater independence. Its primary services—medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation—benefit more than 1 million individuals and their families each year through one of 450 centers nationwide.

The **American Association of Retired Persons ("AARP")** is a nonprofit, nonpartisan membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by states and state entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The **American Association of People with Disabilities (AAPD)** is a national nonprofit, non-partisan membership organization whose mission is to promote the political and economic power of children and adults with disabilities in the United States. Founded on the fifth anniversary of the Americans with Disabilities Act (ADA), AAPD has a strong interest in full and effective enforcement and implementation of that landmark law. With more than 115,000 members, AAPD is the largest cross-disability membership organization in the United States.

The **Epilepsy Foundation** is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than 2.5 million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, including the delivery of public services and participation in public programs. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

The **National Federation of the Blind (NFB)** is the leading national organization of blind persons, with affiliates in all 50 states, the District of Columbia and Puerto Rico. Most of its approximately 50,000 members are blind. NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. NFB promotes the general welfare of the blind by (1) assisting the blind to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and

blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life.

The **Polio Society** serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome.

The **Association on Higher Education and Disability ("AHEAD")** is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including public services, professional licensing and employment, among other state activities. Its membership includes approximately 2,000 institutions including colleges, universities, and not-for-profit service providers, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

United Cerebral Palsy Associations, Inc. is one of the oldest and largest national health organizations dedicated to improving the lives of people with disabilities. Founded in 1949, the organization advances the independence, productivity and full citizenship of people with disabilities through a nationwide network of approximately 100 affiliates in 37 States and the District of Columbia. United Cerebral

Palsy was one of the major leaders in supporting enactment of the Americans with Disabilities Act.

The **National Lawyers Guild**, founded in 1937 as an alternative to the then-racially segregated American Bar Association, is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Through its members – lawyers, law students, jailhouse lawyers and legal workers united in chapters and committees – the Guild works locally, nationally and internationally as an effective political and social force in the service of the people. The central aims of the Guild include safeguarding and strengthening the rights of minority and oppressed groups, including people with disabilities; maintaining and protecting civil and human rights and liberties in the face of persistent attacks; and using the law as an instrument for the protection of the people, rather than for their repression.

The **National Council on Independent Living ("NCIL")** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, statewide independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

The **National Mental Health Consumers' Self-Help Clearinghouse** is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support

services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, validly abrogates state sovereign immunity for suits for damages by inmates alleging disability-based discrimination by state prison officials.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 9

I. MOST ACTIONS BY STATE PRISON OFFICIALS, AND DISTINCTIONS BASED ON DISABILITY, ARE SUBJECT TO DEFERENTIAL CONSTITUTIONAL REVIEW 10

A. Disability-Based Classifications Are Subject To Rational-Basis Review 11

B. Constitutional Review Of Disability-Based Classifications In The Prison Context Is Further Constrained By The Essential Nature Of Incarceration And The Rule Of Deference To Prison Officials' Actions 14

II. IN ENACTING TITLE II OF THE ADA, CONGRESS DID NOT IDENTIFY A HISTORY AND PATTERN OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES AGAINST DISABLED STATE PRISON INMATES 19

A. The Proper Context For Evaluating The Abrogation Claim In This Case Is The Specific Prison Context, Not The General Area Of "State Services And Programs" 20

TABLE OF CONTENTS
(continued)

Page

B. The Legislative Record Does Not Show That Congress Enacted The ADA On The Basis Of Fourteenth Amendment Violations In The State Prison Context 22

C. Petitioners' Reliance On Eighth Amendment Decisions To Support Their Abrogation Claims Is Without Merit 27

D. Petitioners' Collection Of Judicial Decisions Demonstrates No History Of "Widespread And Persisting Deprivation Of Constitutional Rights" Regarding Disabled State Prisoners 29

1. Two-Thirds Of Petitioners' "Massive Body" Of Cases Could Not Have Been Considered By Congress Because They Postdate The 1990 Enactment Of The ADA 30

2. Most Of Petitioners' Pre-ADA Cases Are Facially Inapposite 31

3. The Few Judicial Decisions Remaining Are Too Isolated And Sporadic To Demonstrate A "Widespread And Persisting" Pattern Of Unconstitutional Treatment Of Disabled State Prisoners 36

III. TITLE II OF THE ADA IS NOT A PROPORTIONATE OR CONGRUENT REMEDY UNDER SECTION 5 38

CONCLUSION 45

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) 10
Allegheny Pittsburgh Coal Co. v. County Commission of Webster Cty., 488 U.S. 336 (1989) 16
Balla v. Idaho State Board of Corrections, 595 F. Supp. 1558 (D. Idaho 1984) 33
Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd in part, rev'd in part*, 993 F.2d 1551 (10th Cir. 1993) 33
Baumann v. Ariz. Department of Corrections, 754 F.2d 841 (9th Cir. 1985) 17
Board of Trustees of University of Ala. v. Garrett, 531 U.S. 356 (2001) ..... *passim*
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 42, 43
City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 7, 11, 16, 40
Civil Rights Cases, 109 U.S. 3 (1883) 38
Correctional Services Co. v. Malesko, 534 U.S. 61 (2001) 19
Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556 (1st Cir. 1988) 17, 18
Duran v. Anaya, 642 F. Supp. 510 (D.N.M. 1986) 34
Edelman v. Jordan, 415 U.S. 651 (1974) 10
Elliott v. Brooks, 188 F.3d 518 (10th Cir. 1999) 17
Eng v. Smith, 849 F.2d 80 (2d Cir. 1988) 34
Estelle v. Gamble, 429 U.S. 97 (1976) 18, 42
Farmer v. Brennan, 511 U.S. 825 (1994) 18, 19
Fla. Prepaid Postsecondary Education Expense Board v. College Sav. Bank, 527 U.S. 627 (1999) ..... *passim*
Gibson v. Federal Bureau of Prisons, 121 Fed. Appx. 549 (5th Cir. 2004) 17

TABLE OF AUTHORITIES
(Continued)

Page

Gregory v. Ashcroft, 501 U.S. 452 (1991) 1
Griffin v. Breckenridge, 403 U.S. 88 (1966) 42, 43
Hope v. Pelzer, 536 U.S. 730 (2002) 18
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982) 17
Johnson v. California, 125 S. Ct. 1141 (2005) 15
Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977) 14, 41
Kelo v. City of New London, 125 S. Ct. 2655 (2005) 16
Key v. Grayson, 179 F.3d 996 (6th Cir. 1999) 21
Kimel v. Fla. Board of Regents, 528 U.S. 62 (2000) ..... *passim*
LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987) 21
Lewis v. Casey, 518 U.S. 343 (1996) 16
Mathews v. Lucas, 427 U.S. 495 (1976) 40
McMillian v. Monroe County, 520 U.S. 781 (1997) 35
McNeil v. United States, 508 U.S 106 (1993) 41
Meachum v. Fano, 427 U.S. 215 (1976) 15
Miller v. King, 384 F.3d 1248 (11th Cir. 2004) 6
More v. Farrier, 984 F.2d 269 (8th Cir. 1992) 17
Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) ..... *passim*
O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 10, 14, 15
Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 27
Overton v. Bazzetta, 539 U.S. 126 (2003) 15
Palmer v. Hudson, 468 U.S. 517 (1984) 7, 14, 22
Penn. Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 16
Richardson v. Ramirez, 418 U.S. 24 (1974) 14
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 15

TABLE OF AUTHORITIES
(Continued)

Page

Schmidt v. Odell, 64 F. Supp. 2d 1014 (D. Kan. 1999) 21
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 1
Smith v. City of Jackson, 125 S. Ct. 1536 (2005) 28
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 10
Tennessee v. Lane, 541 U.S. 509 (2004) ..... *passim*
Turner v. Safley, 482 U.S. 78 (1987) 7, 15, 16, 40
United States v. Booker, 125 S. Ct. 738 (2005) 43
United States v. Carolene Products Co., 304 U.S. 144 (1938) 39
United States v. Raines, 362 U.S. 17 (1960) 42, 43
Wilson v. Seiter, 501 U.S. 294 (1991) 44

State Cases

Goodman v. State, 237 Ga. App. 795, 516 S.E.2d 824 (1999) 2, 3

Federal Statutes

U.S. Const., amend. VIII, § 5 ..... 5, 6
U.S. Const., amend. XI, § 1 ..... *passim*
U.S. Const., amend. XIV, § 1 ..... 9, 27
U.S. Const., amend. XIV, § 5 ..... *passim*
Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA")(Pub. L. No. 96-247, 94 Stat. 349) 25
Rehabilitation Act of 1973 (Pub. L. No. 93-112, 87 Stat. 394) 25
Civil Rights Act of 1957, 42 U.S.C. § 1971 42
42 U.S.C. § 1983 ..... 5, 29
Prison Litigation Reform Act of 1995, P.L. 104-134, tit. VII, 42 U.S.C. § 1997e 28
42 U.S.C. § 12101(a)(7) 39
Americans with Disabilities Act of 1990, 104 Stat. 337, 42 U.S.C. §§ 12131-12165 ..... 1, 39
42 U.S.C. § 12132 ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page

Legislative Materials

H.R. Rep. No. 101-485 (Pts. 1-4) (1990) 7, 22, 24, 25
S. Rep. No. 100-116 (1989)..... 22, 24
136 Cong. Rec. S9527-02 (daily ed. July 11, 1990)..... 25
141 Cong. Rec. S7256 (daily ed. May 25, 1995) 28
ADA: Joint Hearing on S. 2345, 100th Cong. 1190 ..... 23, 24
ADA: Joint Hearing on H.R. 2273 (July 18, 1989)..... 24

Miscellaneous

S. Ct. R. 14.1(a)..... 41
Karen M. Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983,* 34 STETSON L. REV. 623 (2005) 35
"Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment*" (1990) 26
U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983) 25, 26

STATEMENT

This case asks whether Congress validly abrogated the States' Eleventh Amendment immunity in Title II of the Americans With Disabilities Act of 1990 (the "ADA"), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, as applied to suits for damages brought by disabled state-prison inmates. More specifically, it presents the question whether *Tennessee v. Lane*, 541 U.S. 509 (2004), which held that Congress, in enacting Title II of the ADA, validly abrogated state sovereign immunity "as applie[d] to the class of cases implicating the accessibility of judicial services," *id.* at 531, extends to state prison inmates who challenge the actions and omissions of state prison administrators.

As this Court's decisions in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny have demonstrated, one of the few limitations imposed by the United States Constitution on such otherwise-sensible measures as the ADA arises where one sovereign attempts to impose a money-damages remedy on another sovereign. No State could impose such an obligation upon the federal government, or upon another State. In our government of "dual sovereigns," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), the Eleventh Amendment similarly cabins (though it does not absolutely forbid) the power of Congress to pass laws that seek to give citizens the ability to sue an unconsenting state for damages. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

A State's Eleventh Amendment immunity may be abrogated only when Congress expresses its intent to do so, *and* properly acts pursuant to a constitutional provision granting it the right to abrogate. Section 5 of the Fourteenth Amendment, also known as the Enforcement Clause, provides the primary avenue through which Congress can abrogate a state's Eleventh Amendment immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59-66 (1996). Under § 5, Congress may enact legislation allowing private

individuals to sue the States for damages only if such legislation is limited to the purpose of "enforcing, by appropriate legislation" the substantive guarantees of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 517-18; *Lane*, 541 U.S. at 554 (Scalia, J., dissenting). That, in turn, requires the Court to determine what constitutional guarantee required remediation, whether Congress was in fact responding to a widespread and intractable problem of unconstitutional state discrimination, and if so, whether Congress's chosen remedy was proportional and congruent to these constitutional violations.

The resolution of each of these questions should lead the Court to conclude that Congress did not validly abrogate state Eleventh Amendment immunity as applied to the class of cases where disabled state inmates seek money damages for denial of access to "services, programs, or activities." *See* 42 U.S.C. § 12132. Accordingly, the Court of Appeals' judgment should be affirmed.

Briefly stated, the facts of this case are as follows:

1. Petitioner Tony Goodman, a paraplegic with a prior felony conviction, returned to a state prison in 1995 after being convicted of aggravated assault, possession of cocaine with intent to distribute, and possession of a firearm by a convicted felon. Goodman had a domestic dispute with his live-in girlfriend outside their home, and he shot at her with a gun. *Goodman v. State*, 237 Ga. App. 795, 516 S.E.2d 824 (1999). When the shot missed, the woman ran inside and called 911. According to trial testimony, the gun jammed and Goodman chased her down, got out of his wheelchair, and beat her with the gun. When police arrived, they found a fight in progress. The woman was cut and bruised and "her blood was splattered on the wall." *Id.*, 516 S.E.2d at 825. Police officers then found 22 pieces of crack cocaine. *Id.* at 795-96, 516 S.E.2d at 825. Goodman claimed at trial that he did not know where the drugs had come from, but "theorized that [his brother and girlfriend] were having an affair and

that they placed the gun and cocaine on him in an elaborate scheme to frame him." *Id.* at 796, 516 S.E.2d at 826. The jury convicted Goodman and he was sentenced to a term of years in the Georgia state prison system.

2. Goodman, who has filed more than 60 lawsuits since his incarceration in the Georgia State Prison (*see* Br. in Opp. to Cert. 1-2 n.1), filed this civil action in federal district court in January 1999. J.A. 27.

a. Goodman's *pro se* complaint alleged a variety of wrongs, ranging from the temperature in his cell in the Georgia State Prison (J.A. 38) to the lighting in the facility. J.A. 48. Relevant to the question before this Court are the following claims and allegations:

—That the Department of Corrections violated his ADA rights when they transferred him from a "medical prison" to Georgia State Prison and denied or excluded him from participation in Mental Health/Mental Retardation programs and activities. J.A. 34.

—That he is entitled to relief for "his continued confinement in segregated environment, on the grounds of unlawful disability-based discrimination. Defendants have confined Plaintiff to [the Georgia State Prison] where that Plaintiff could be appropriately treated in more integrated community setting." Goodman added that "the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disability-based discrimination. Here the Defendants has [*sic*] violated the core principle underlying the A.D.A.'s integration mandate." J.A. 35.

—That the unit he lived in "lacks facilities for the disabled 'for hygiene, drinking and performing body excretion functions.'" J.A. 39.

—That he was given no assistance by staff in using the toilet and getting to his bed and has thus suffered injuries. J.A. 39.

—That he was kept "in a very small cell (12 feet long and 3-feet wide) which he can not [turn] his wheelchair around in side of this cell." J.A. 38-39.

—That he has "been forced to sit in his own waste, denied of catheter, denied of rehabilitative exercises, denied of assistance in being transferred from his w/c [*sic*], to the bed all of which resulted, among other things, in the Plaintiff not getting a bath or a shower for (10) months." J.A. 43.

—That he could not access the prison law library. J.A. 41-42.

b. In other papers, which the Court of Appeals also considered, Goodman alleged that he was injured in transferring to or from his toilet. He says he fell and broke his right toe and crushed his right knee on five different occasions between August 1998 and April 1999. J.A. 55. He alleges that within one month between mid-March and mid-April 1999, he broke the same toe and crushed the same knee three times from toilet-transfer falls. J.A. 55. He also claims that, on August 26, 1998, the toilet seat in his cell was not stable, and so he fell when he "hurl[ed]" himself onto the toilet, in turn causing an epileptic seizure. J.A. 55. He alleges he once defecated and urinated on himself and, when he requested cleaning supplies and assistance from staff members, they refused. J.A. 65.

c. Finally, in his Statement of Undisputed Facts in support of his motions for Summary Judgment, Goodman alleged he had been denied certain "Privileges and Rights" granted to other inmates at his security level, including "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights, also we are being denied of medical supervision and education concerning 'diabetes and hypertension.'" J.A. 65, 83-84.

d. The State has continually denied Goodman's factual allegations (J.A. 72-73, 93-95), and has pointed out to the